# Contextualized cosmopolitanism: human rights practice in South Korea

Shin, Yoon Jin

Veröffentlichungsversion / Published Version
Arbeitspapier / working paper

**Zur Verfügung gestellt in Kooperation mit / provided in cooperation with:**
Wissenschaftszentrum Berlin für Sozialforschung (WZB)

**Empfohlene Zitierung / Suggested Citation:**
Shin, Y. J. (2017). *Contextualized cosmopolitanism: human rights practice in South Korea.* (Discussion Papers / Wissenschaftszentrum Berlin für Sozialforschung, Center for Global Constitutionalism, SP IV 2017-801). Berlin: Wissenschaftszentrum Berlin für Sozialforschung gGmbH. http://hdl.handle.net/10419/162005

Shin, Yoon Jin

**Working Paper**

# Contextualized cosmopolitanism: Human rights practice in South Korea

WZB Discussion Paper, No. SP IV 2017-801

**Provided in Cooperation with:**
WZB Berlin Social Science Center

Suggested Citation: Shin, Yoon Jin (2017) : Contextualized cosmopolitanism: Human rights practice in South Korea, WZB Discussion Paper, No. SP IV 2017-801, Wissenschaftszentrum Berlin für Sozialforschung (WZB), Berlin

This Version is available at:
http://hdl.handle.net/10419/162005

WZB
Berlin Social Science Center

Yoon Jin Shin

# Contextualized Cosmopolitanism:
# Human Rights Practice in South Korea

**Discussion Paper**

SP IV 2017–801

April 2017

Center for Global Constitutionalism

WZB

Research Area

**International Politics and Law**

Department

**Center for Global Constitutionalism**

WZB Berlin Social Science Center
Reichpietschufer 50
10785 Berlin
Germany
www.wzb.eu



Wissenschaftszentrum Berlin für Sozialforschung (2017)
Yoon Jin Shin
**Contextualized Cosmopolitanism: Human Rights Practice in South Korea**
Discussion Paper SP IV 2017–801

Abstract

**Contextualized Cosmopolitanism: Human Rights Practice in South Korea**

by Yoon Jin Shin

There are three prominent criticisms directed against those engaging with human rights practice: First, the claim that human rights norms effectively erase the local in favor of an abstract universal; second, that human rights enterprises fail to appreciate its Western colonial continuities; and third, that the rights discourse functions predominantly in a top-down mode, drowning out the multitude of voices on the ground. Drawing on the dynamic aspects of human rights practices by and through the Constitutional Court of South Korea—which the paper understands as *contextualized cosmopolitan* human rights practices—this paper illustrates how such criticisms are too generalized. First, it illuminates the conflicts, struggles and innovations developed in the course of the court's engagement with international human rights norms: illuminating how the court incorporates the norm as a substantive standard for rights review, while defying a simple priority of international human rights law in a domestic legal order. Second, it examines the court's transforming self-identity reflected on and evolved through its engagement with foreign law and practice of human rights: observing the court's self-emancipation from a traditional focus on a few influential powers to a more inclusive comparative practice across wider jurisdictions of the world, and its effort to establish itself as a regional leader in human rights jurisprudence. Third, the practice of the court shows how rights discourse productively internalizes the tension between local traditions and universal standards. Finally, the paper underlines the role of individual rights-holders in the above contexts and argues that the empowerment and emancipation of the individual is a genuine effect of rights contestation and the rights review system. Through these *contextualized and bottom–up* cosmopolitan human rights practices, local rights actors concretize and advances the meaning and the operation of universal human rights norms in their specific contexts.

*Key words: human rights, contextualized cosmopolitanism, international human rights law, foreign law, tradition, rights review, bottom–up rights practice, individual empowerment*

## Introduction

There are three prominent criticisms directed against those engaging with human rights practice, either as human rights lawyers or as comparativists. First, the claim is that human rights, as they are invoked and practiced, effectively dominate or erase the local in favor of an abstract universal.[1] Second, human rights and the legal disciplines celebrating their rise and spread fail to appreciate the Western colonial continuities that come with such a practice.[2] Third, the rights

---

[1] E.g., Günter Frankenberg notes, "The universal reach and claim come at a cost, though. The particularity of the individual complaint is never completely exhausted but take as an instance ... to be fitted and dealt with in the all-encompassing universal scheme. And this way, many aspects the individual may find crucial get lost in translation." GÜNTER FRANKENBERG, COMPARATIVE LAW AS CRITIQUE 94 (2016). This line of criticism underlies the *universal human rights vs. cultural relativism* debate. *See generally* Jack Donnelly, *Cultural Relativism and Universal Human Rights,* 6 HUM. RTS. Q. 400 (1984). In a slight different angle, Frankenberg also criticizes that the process of "normalization" of real life suffering into the language of human rights flattens and distorts the reality and only delivers partly the story. FRANKENBERG, *id.* at 176–77, 202. A similar line of criticism is raised against traditional comparative law methodologies such as functionalist or structuralist approaches. FRANKENBERG, *id.* at 54 (noting, "[R]ather than indulging in the social, political, economic and cultural context of law, the functionalist radicalizes de-contextualization by 'cutting loose' and 'stripping' the solutions generated by the diverse legal regimes ...", quoting KONRAD ZWEIGERT AND HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 36–37 (1998)). Frankenberg also critically discusses the approach taken by the Trento Group's Common Core project, pointing out "[w]hile the Trentoes bravely plod through what they consider 'natural' facts and grasp the factual world out there, they resort to what Geertz would have called the 'sterilization of fact,' oblivious to their own fact-making." FRANKENBERG, *id.* at 65 (footnote omitted). *See also* Jule Mulder, *New Challenges for European Comparative Law: The Judicial Reception of EU Non–Discrimination Law and a Turn to a Multi–Layered Culturally–Informed Comparative Law Method for a Better Understanding of the EU Harmonization*, 18 GERMAN L.J. (forthcoming, 2017) (pointing out "a common core approach, like functionalism, is likely to overlook relevant divergences because it tends to exclude a large number of facts which are not strictly legal ... the question remains whether we can ever understand sterilized, fabricated, abstract factual scenarios removed from their social, economic, and cultural contexts").

[2] FRANKENBERG, *id.* at 188 ("Since human rights law has replaced the exhausted natural rights tradition, it was linked to one or the other political agenda: Western anti-communism and Easter anti-imperialism, first; later, foreign aid/development and the promotion of democracy; and more recently humanitarian intervention and neo-liberal restructuring of economies. Accordingly, 'the holy trinity' of liberalism, democracy and human rights has been said to serve as the 'West's ideology, the credo of a new world order,' ... ") (footnote omitted); FRANKENBERG, *id.* at 194 ("[T]he universal grasp, to preserve its allure, denies the Eurocentric particularity of the human rights corpus and denies its cultural specificity, ..."). *See generally* MAKAU MUTUA, HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE (2002); ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2007); MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960 (2001). See also Frankenberg's critique on comparative law methodologies in terms of "cognitive control" and a Western-centered view underlying the project such as Universal Dreams Inc., led by "Anglo-European universalist[s]." FRANKENBERG, *id.* at 85–104.

discourse in its operation is claimed to function predominantly in a top-down mode, drowning out the multitude of voices on the ground.[3]

Drawing on the practice of human rights adjudication by the Constitutional Court of South Korea, the following will illustrate not that these claims are categorically wrong, but how such claims are too generalized. In some sense, such critiques fall prey to the very sensibility that is the focus of their criticisms. Frist, these critiques are insufficiently contextualized, and if so only selectively, rarely engaging closely with how rights claiming actually functions. Second, this line of criticism is too focused on the West and its influence (an inverse imperialism, perhaps, the manifestation of the bad conscience that comes with post-imperial sensibilities) and insufficiently attuned to struggles as they are taking place outside of the West. And third, the criticism is too focused on the operational mode taken by elite international or state actors. It tends to downplay the empowering function that rights claiming can have on those individuals who are marginalized and oppressed within their societies and the dynamic process of concretizing the meaning of human rights achieved through bottom-up rights practice.

This paper discusses *contextualized cosmopolitan* rights practice exemplified by the case of the South Korean Constitutional Court, focusing on four aspects. First, it examines how the court engages with international law of human rights when adjudicating rights claims domestically. It illuminates how this national court understands and interprets human rights norms in relation with its domestic legal order, and the conflicts, struggles and innovations developed in the course of such engagement. Whereas the exact terms of engagement of the national with the

---

[3] Human rights law is often regarded and accused as a static program unilaterally decided and imposed by international (predominantly Western) elite groups. *E.g.*, FRANKENBERG, *id.* at 187 ("Theories of human rights qualify as ideologies insofar as they contain 'prepackaged units of interpretation' ordering the world and shaping the vision of how the world is or, rather, should be seen. … They are offered either by a dominant class or elite or by the non-dominant class or their advocates as mobilizing message to persuade the recipients to look at things and understand reality from the offered point of view, …"); FRANKENBERG, *id.* 195–201 (discussing human rights narratives as a modern "mythology" and a political-educational agenda). Alienation of ordinary persons caused by human rights discourses and practices taken up by legal professionals is another relevant point of criticism frequently made: "The alienating effect … relegates rights-holders to the role of intimidated and rather ignorant bystanders who observe the automatic functioning of well-oiled, complex legal machinery." FRANKENBERG, *id.* 179–80.

international are subject to debate, the court rejects a simple priority of international human rights law and casts the issue as one subject to national interpretative control. Second, in the court's engagement with foreign law and practice of human rights, it is possible to observe an emancipation from a traditional focus on a few influential powers such as Japan, Germany and the United States to a more inclusive citation practice across wider jurisdictions of the world. The development reflects a transforming self-identify of the court aligning with its effort to establish itself as a regional leader in human rights jurisprudence. Third, the practice of the court shows how rights discourse productively internalizes the tension between local traditions and universal standards. Here the human rights norm serves as a critical standard triggering justificatory engagement—operating through the various prongs of the proportionality test—with local traditions and practices. Human rights practices that have these three features can be called *contextualized cosmopolitanism*: Local actors reflect on their specific situations in light of universal norms embodied in the national constitution whose meaning is concretized by engagement with the practices of other jurisdictions and international human rights law. Finally, toward the conclusion, the paper underlines the role of individual rights-holders in this context and argues that the empowerment and emancipation of the individual is a genuine effect of rights contestation and the rights review system, and not merely an effect imagined by international idealists or Western political elites. This case study provides comparative and human rights lawyers with some further non-western contexts to productively engage in self-criticism and do justice to the efforts undertaken elsewhere.

## Contextualized Engagement with International Human Rights Law

The creation of the Constitutional Court of Korea (the South Korean Constitutional Court) was one of the key elements of the historic amendment of the South Korean Constitution in 1987, the momentous year that Korea achieved democratization, led by citizens' nationwide movement and ending the three decades of military

dictatorship.[4] Partly because Asia has no supranational human rights adjudication system at the regional level, constitutional courts and their equivalent bodies in Asia are often the only venue for ordinary citizens and non-citizens to contest their human rights. Under this structure, individuals in South Korea have frequently sought the Constitutional Court as a platform to invoke and apply international human rights norms as one of the grounds for their rights claims.[5] The Court has gradually become a site where international human rights law and constitutional law squarely meet. This section examines how the Court engages with international human rights law in the course of rights contestation and adjudication.[6] The discussion will demonstrate that international human rights law does not operate at the domestic level in a static top-down manner as generally assumed or accused of, but that the international norm attains its meaning and place through dynamic bottom-up engagement by a local rights adjudication body constantly seeking for a desirable status and effect of international law in a domestic legal order.

---

[4] For English literature surveying the history and system of constitutional courts in Asia, including South Korea, see generally TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (2003).

[5] Since it began operating in September 1988, the South Korean Constitutional Court has played an active role. As of December 2016, the Court has received 30,591 applications and decided 10,897 cases on the merits. The cases brought to the Court have increased gradually—362 cases in 1990, 1,060 cases in 2001, 1,720 cases in 2010, and 1,951 cases in 2016. Among the 2,992 cases the Court decided on the merits regarding the constitutionality of specific domestic law, the Court has invalidated 653 laws as unconstitutional, either in entirety or in part. Among the 7,866 cases decided on the merits concerning government actions, the Court has found 769 cases unconstitutional. The statistics of the court cases are regularly updated on the Court's English website: http://english.ccourt.go.kr/cckhome/eng/decisions/caseLoadStatic/caseLoadStatic.do.

[6] An introductory comparative research of Korean and Taiwanese constitutional court cases has been conducted by Wen-Chen Chang, *The Convergence of Constitutions and International Human Rights: Taiwan and South Korea in Comparison*, 36 N.C. J. INT'L L. 593 (2011). Broader discussions on the subject include VICKI JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA (2013); Mattias Kumm, *Democratic Constitutionalism Encounters International Law: Terms of Engagement*, *in* THE MIGRATION OF CONSTITUTIONAL IDEAS 256 (Sujit Choudhry ed., 2006); Stephen Gardbaum, *Human Rights and International Constitutionalism*, *in* RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE 233 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009).

## 1. Legal Framework and the Conventional Theory

As is the case for many other states' constitutions, the South Korean Constitution mentions the domestic legal status of international law, but in a relatively abstract manner. Article 6 paragraph 1 of the Constitution provides: "Treaties duly concluded and promulgated under the Constitution and the generally recognized rule of international law shall have the same effect as the *domestic law* of the Republic of Korea" (emphasis added). A traditional view among public law scholars in South Korea reads the "domestic law" in this provision to mean *statutes*, one of the five levels of domestic law in Korea—the constitution, statutes, enforcement decrees (issued by the president), enforcement regulations (issued by a relevant ministry), and local ordinances. Most Korean scholars hold the view that international human rights law (IHRL) is not different from other kinds of international law in its domestic legal status. The fact that several international human rights norms have achieved the status of *jus cogens* does not matter from this viewpoint. The decisive criteria is what each state's constitution dictates. These scholars defend their position by relying on national sovereignty, consent-based international treaty systems, the supremacy and autonomy of the national constitution, and comparison with domestic lawmaking process (noting that IHRL cannot have a constitution-like status since its adoption does not follow a process equivalent to constitutional amendment). They also point out that the text of the South Korean Constitution does not distinguish IHRL from other types of international law.[7] This position implies that IHRL, along with other international treaties, may not serve as a standard for constitutional review, since its legal status is not superior to statutes.

---

[7] These scholars also invoke the South Korean Constitution Addenda Article 5, providing, "Acts, decrees, ordinances and treaties in force at the time this Constitution enters into force, shall remain valid unless they are contrary to this Constitution." They claim this provision establishes the supremacy of the Constitution over international law. However, a persuasive counterargument can be made that this clause does not preclude the possibility that international law can have a status equivalent to the constitution, even though it cannot override the constitution. This provision can be deemed to acknowledge the possibility of a pluralist legal system with IHRL and constitutional law as equal constituents.

## 2. Cases

The practice of the South Korean Constitutional Court over the years indicates that the Court has departed from the conventional theory described above regarding the legal status and effect of IHRL.

In the *Foreign Industrial Trainees* case, a few migrant workers, represented by a group of human rights lawyers, challenged the national foreign labor system. Until then, simple skilled migrant workers were not treated as "workers" in a legal sense, but were classified as "industrial trainees" and were denied the equal protection of labor rights and full application of the Labor Standards Act. In 2007, the Court held that the foreign trainee system was unconstitutional as a whole in violation of the right to equality of these migrant workers.[8] In its reasoning, the Court cited relevant provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR), including the principle of non-discrimination (Art. 2) and the enjoyment of just and favorable working conditions (Art. 7), as an important reference for interpreting the equality clause of the Constitution. The Court specified that "the provisions of this Covenant should be taken into account when interpreting our Constitution."

The Court also frequently cites international human rights documents that do not have binding effect (*soft law*) as resources to consider for constitutional interpretation. In the "*Comfort Women*" case decided in 2011,[9] the Court cited a report by Special Rapporteur on Violence against Women, Radhika Coomaraswamy, "Report on the mission to the Democratic People's Republic of Korea, the Republic of Korea and Japan on the issue of military sexual slavery in wartime" adopted by the UN Commission on Human Rights in 1996, and the 1998 report by Gay J. McDougall, Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict, reporting on the issue of "comfort women" in Korea and Japan. The Court cited these documents in

---

[8] Constitutional Court of Korea, 2004 Hun-Ma 670 (Aug. 30, 2007).

[9] Constitutional Court of Korea 2006 Hun-Ma 788 (Aug. 30, 2011).

determining the significance of the infringement of the rights of victims and holding unconstitutional the Korean government's inaction in resolving this issue. The practice of citing unbinding international human rights documents began in earlier years for a wide range of cases. In the *Teachers' Union* case decided in 1991, the Court discussed the relevance of the ILO/UNESCO Recommendation concerning the Status of Teachers (1966) in deciding the constitutionality of prohibiting private school teachers from enjoying the right to form and join a labor union.[10] In a 1992 case, a detainee challenged the actions taken by investigators at the National Security Agency who attended a meeting between the detainee and his counsel, during which the investigators listened in on and documented their conversations. The Court found this conduct unconstitutional, citing the "Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment" adopted by the United Nations General Assembly in 1988.[11] In a case against a law mandating that employers employ people with disabilities, the Court held the law constitutional, consulting the ILO Recommendation (No. 99) Vocational Rehabilitation (Disabled) Recommendation of 1955.[12]

There are multiple cases in which the Court has shown a stronger mode of engagement. In *Conscientious Objectors*,[13] a group of Korean men who were Jehovah's Witnesses challenged the Military Service Act, which punishes with up to three years' imprisonment anyone refusing to fulfill their obligatory military service. The Court explicitly reviewed whether this domestic law was in violation of international human rights law. The Court first pointed to Article 6 paragraph 1 of the Constitution ("Treaties duly concluded and promulgated under the Constitution and the generally recognized rule of international law shall have the same effect as the domestic law of the Republic of Korea"), and found that this provision declares the *constitutional principle of respecting international law*. The

---

[10] Constitutional Court of Korea, 89 Hun-Ga 106 (Jul. 22, 1991).

[11] Constitutional Court of Korea, 91 Hun-Ma 111 (Jan. 28, 1992).

[12] Constitutional Court of Korea, 2001 Hun-Ba 96 (Jul. 24, 2003).

[13] Constitutional Court of Korea, 2008 Hun-Ga 22 (Aug. 30, 2011).

Court then proceeded with a substantive review of whether international human rights law mandates states to recognize the right to conscientious objection, and answered in the negative. The majority opinion examined Article 18 of the International Covenant on Civil and Political Rights (ICCPR), which South Korea joined in 1990, and pointed out that the Covenant does not specifically mention the right to conscientious objection in its provision on the rights to thought, conscience and religion. The Court mentioned in detail the interpretations by the UN Human Rights Committee and the earlier Commission on Human Rights that Article 18 of the ICCPR includes the right to conscientious objection, and these bodies' recommendations to member states to recognize this right and to adopt an alternative service system for conscientious objectors. However, the Court held that their interpretations "are only recommendations, not having binding effect." It also viewed that the right to conscientious objection cannot be deemed as customary international law either, even though several countries, including European states, recognize this right. The Court concluded that currently there is no international law guaranteeing the right to conscientious objection, so it is not a violation of the constitutional principle of respecting international law under Article 6, even though South Korea criminally punishes conscientious objectors. In contrast, two dissenting justices cited the UN bodies' recommendations along with the established practices of other countries as grounds for its opinion that the law is unconstitutional in violation of the right to conscience.

The ICCPR has been taken as a direct standard of constitutional review along with relevant constitutional provisions (including Article 6 and provisions on fundamental rights) in less prominent cases as well. In a case brought against the criminal law penalizing collective refusal to work by employees, the Court reviewed whether that provision was in violation of the ICCPR Article 8 providing for the right against forced labor, and found in the negative.[14] In a case on the constitutionality of a domestic law punishing the act of issuing a bounced check with willful negligence, the Court reviewed whether the law violated the ICCPR

[14] Constitutional Court of Korea, 97 Hun-Ba 23 (Jul. 16, 1998).

Article 11 ("No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation") and answered in the negative.[15]

The above examples show how the Court engages with IHRL in the course of rights review. The Court has yet to articulate the exact status of IHRL in the domestic legal order of South Korea. However, its actual practice suggests that the Court regards IHRL differently from other types of international law. As exemplified above, the Court sometimes takes IHRL as an important reference for interpreting relevant constitutional provisions. In this case, non-binding international documents are also frequently consulted. On other occasions, the Court directly takes up IHRL, mostly major human rights covenants as the ICCPR, as a standard for rights review. In such cases, the Court usually relies on Article 6 paragraph 1 of the Constitution as a link, reading this provision as embodying a more general constitutional principle of respecting international law. Through this approach of reasoning, IHRL is elevated from a resource of reference to a standard of review. This status of IHRL is contrasted with the Court's attitude towards other types of treaties. The Court has repeatedly made it clear that international treaties (which are not human rights treaties) have the same effect as domestic statutes, and thus can only be an object of a constitutionality test, not a standard for constitutional review of other domestic law or state actions. The Court has reviewed the constitutional validity of such treaties in numerous cases.[16]

### 3. A Contextualized Cosmopolitan Rights Practice

As demonstrated in the cases above, the actual practice of the South Korean Constitutional Court deviates significantly from the conventional doctrinal view. Even though the Court has not articulated the precise legal status and effect of IHRL in relation to the constitution, it is clear from its practice that the Court

---

[15] Constitutional Court of Korea, 2009 Hun-Ba 267 (Jul. 28, 2011); 99 Hun-Ga13 (Apr. 26, 2001).

[16] International treaties the Court has reviewed their constitutionality include: Marrakesh Agreement Establishing the World Trade Organization; Articles of Agreement of the International Monetary Fund; Agreement of Fisheries between the Government of the Republic of Korea and the Government of Japan; and Asia-Pacific Regional Convention on the Recognition of Qualifications in Higher Education.

treats IHRL as different in kind from other types of international law. While the current court practices are not perfectly clear or coherent, IHRL obviously functions either as an important reference point for constitutional rights interpretation or as a direct standard of constitutional review, whereas other types of treaties have only been the targets of constitutional review for their validity. The *Conscientious Objectors* case supports the view that the Court regards IHRL to hold a presumptive authority in relation to domestic law and constitutional interpretation.[17] The Court in this case took great pains to prove that there is no IHRL obligating states to recognize a specific right to conscientious objection. If the Court had found otherwise, its decision might have reached a different conclusion. In the *Foreign Industrial Trainees* case, the Court adopted a weaker engagement mode but still seriously consulted the relevant provisions of the ICESCR as an important reference point, acknowledging the necessity to take into account the Covenant's mandates when interpreting the constitution. What makes the Court take this unconventional position, which "Big C constitutionalists"[18] might claim is incoherent or even unconstitutional? Why, on the other hand, has not the Court more clearly pronounced the relation between international and constitutional law and the exact difference between IHRL and other international law? The Court's current practice reflects the conflicts, confusion and struggle that the Court has experienced in the course of engaging with IHRL, while fully aware of the conventional theoretical position, but at the same time recognizing the significance and distinctiveness of human rights norms as opposed to other essentially consent-based treaties.

The current court practice suggests an example of a *contextualized cosmopolitan rights practice*. The Court recognizes that rights should be understood and adjudicated in the intertwined normative set of international and national law,

---

[17] For discussion of the presumptive authority of international law, see e.g., Başak Çalı, THE AUTHORITY OF INTERNATIONAL LAW: OBEDIENCE, RESPECT, AND REBUTTAL (2015); Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EUR. J. INT. L. 907 (2004).

[18] These conventional scholars' position aligns with the "Big C constitutionalist" view elaborated by Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law*, 20 IND. J. GLOBAL LEGAL STUD. 605 (2013).

and that rights bear both universality and locality, which can be realized only through the organic operation of IHRL and the national law.[19] Through this idea and practice evolving around the Court's rights adjudication, IHRL is attaining a constitution-like status, even in the absence of theoretical articulation or sophistication in Korean public law scholarship and without a relevant mandate by international law. The Court justices made a breakthrough in linking IHRL and the constitution by taking a broad interpretation of Article 6 and finding the underlying constitutional principle of respecting international law. This interpretative stretch has enabled the Court to review the constitutional validity of domestic law and state actions in light of international human rights norms in a substantive manner, while sustaining the framework of constitutional review. By approaching international and constitutional law in an integrated manner, the justices exempt themselves from responding to the questions of the precise hierarchal status of IHRL in the Korean constitutional order and whether the Court can take IHRL as a self-standing standard of rights review. Despite the absence of a clear constitutional text or an internationally binding norm on the status of IHRL in a domestic legal order, the Court, by developing its own rights practice, has incorporated IHRL into the national process of rights review.[20] Putting aside the charge of theoretical imperfection that could be raised against this approach, this layered effort represents the Court's understanding of the universality of human

---

[19] For discussion on the cosmopolitan understanding of constitutionalism in relation with international law, see Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State*, *in Ruling the World?*, *supra* note *6*, at 263–64 ("Cosmopolitan constitutionalism establishes an integrative basic conceptual framework for a general theory of public law that integrates national and international law."); Kumm, *supra* note 17, at 611–12 ("[...] the deep interdependencies between national and international law. International law is neither derivative, nor is it autonomous. National and international law are co-constitutive and form an integrative whole."). *See generally* JACKSON, *supra* note *6* (analyzing three modes toward "the Transnational" and describing the mode of "convergence"); Vlad F. Perju, *Cosmopolitanism in Constitutional Law,* 35 CARDOZO L. REV. 711 (2013).

[20] It is notable that some states adopt constitutional provisions more concretely stipulating the effect of international law in general or of certain kinds of international law. See, for example, the Dutch Constitution Article 94, providing, "Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons," and the Constitution of Argentina Section 75 paragraph 22 specifying several international human rights treaties which have constitutional hierarchy.

rights and its normative progress toward a cosmopolitan form of rights practice that contextualizes the rights' universality through the domestic rights review process.[21] The current practice of the South Korean Constitutional Court, including its departure from the conventional doctrinal view, and its struggle and attempt to accommodate IHRL as a substantive standard of review along with the constitution, suggest that the two levels of law can operate in harmony without a need to place them in order under a unitary hierarchy.[22]

The fact that the Court has begun to take IHRL as a direct standard of rights review, not merely as a point of reference, is a notable step forward, especially as compared to other well-known models. The South African Constitution requires the court only to *consider* international law when interpreting its bill of rights.[23] The German Constitutional Court held that the ECHR as interpreted by the European Court of Human Rights must be *taken into account* when the German court makes a decision on relevant rights.[24] However, limitations also exist in Korean practice that might undermine the progressiveness shown by the South Korean Constitutional Court. It is still debatable whether the Court always takes engagement with IHRL as its duty. The Court typically draws on IHRL when

---

[21] Understanding the role of national court in cosmopolitan terms goes in line with Mulder's analysis "focusing on the judicial reception of EU harmonized law and national-European legal hybrids because national courts are part of an inter-community group of courts and are embedded in their own cultural context" and emphasizing "the national identity, self-understanding and legal consciousness surrounding the application of harmonized law at the national level." Mulder, *supra* note 1, at.

[22] This practice hints at a model of pluralist operation of international and constitutional law in rights adjudication. Research on pluralist legal systems have predominantly concentrated on the European context, focusing on Europe's supranational regimes and its relation to individual states' legal orders. To mention just a few, CONSTITUTIONAL PLURALISM IN THE EUROPEAN UNION AND BEYOND (Matej Avbelj & Jan Komárek eds., 2012); Neil Walker, *The Idea of Constitutional Pluralism*, 65 MODERN L. REV. 317 (2002); Miguel Maduro, *Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism*, *in* RULING THE WORLD?, *supra* note *6*, at 356–80. *See also* Alec Stone Sweet, *A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe*, 1 GLOBAL CONSTITUTIONALISM 53 (2012).

[23] The Constitution of South Africa Art. 39 (1) When interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.

[24] Görgülü v. Germany (2004) 2 BvR 1481/04. *See* Kumm, *supra* note *6*, at 280–81; Christian Tomuschat, *The Effects of the Judgments of the European Court of Human Rights According to the German Constitutional Court*, 11 GERMAN L.J. 513 (2010).

applicants or their lawyers invoke the mandates of IHRL as one of the grounds for their rights claims. It is the Court's duty to discuss IHRL when it is part of the claim; if not, an explicit engagement with IHRL still seems discretionary. In this regard, one may argue that the Korean approach is closer to that of the U.S. Supreme Court (irregularly engaging with international law) than to the German model which takes engagement as obligatory. However, one could also point out that the German "duty to consider" model concerns the relation between the national constitution and the ECHR, the regional human rights regime with which individual member states have vowed a tighter affiliation, and is not about IHRL. Another controversial point is the South Korean Constitutional Court's attitude toward soft IHRL. The *Conscientious Objectors* case leaves much to debate as the Court discussed and dismissed as non-binding the recommendations by the Human Rights Committee directed to the Korean government, while the dissenting justices took these documents seriously. Lastly, since most constitutional rights claims invoke IHRL along with relevant provisions of the constitution, it remains unclear how the Court would respond if a rights claim were to invoke IHRL as the sole basis for challenging the validity of domestic law or government actions.

Despite these limitations, insufficient coherence, and vagueness, the overall practice by the South Korean Constitutional Court of engaging with IHRL reflects the growing cosmopolitan ideas of rights conceived and embodied by a national actor. It is this local court and rights-claiming individuals who are constantly seeking to make a better sense of international law in their domestic legal context through contestatory and deliberative rights practices. These local actors neither tie themselves to the traditional dogmatic theory, nor take IHRL as a body of law categorically superior to national law or the constitution. Progressively linking IHRL and constitutional law through the expansive interpretation of Article 6 of the South Korean Constitution has been the Court's own innovation empowered by individuals' rights claims invoking international norms in a domestic rights review process. Through this engagement, the identity and the role of the Court goes beyond that of a domestic constitutional court: While based on a specific

jurisdiction in Asia, the Court is growing into an important player in the cosmopolitan practice of concretizing and contextualizing the meaning and the operation of universal human rights norms.[25] This local story provides an illustration that international law does not necessarily operate in a top-down manner imposing on local actors a fixed set of human rights norms and programs decided at the international level. The concrete meaning, status and effect of international human rights law are constituted by local rights actors through a bottom-up process. Acknowledging IHRL's quasi-constitutional status is a development made by domestic actors through their constant and dynamic engagement with the universal, under continuous normative tensions productively managed through a rights contestation process. International law, by not dictating on this matter, upholds this mode of engagement. Comparativists' critiques on human rights practice as being a static, top-down, and Western project are not applicable to this local context.[26]

## Emancipatory Engagement with Foreign Rights Practices

### 1. Trajectory of Development

As a local rights court refers to and cites foreign human rights law and practices in its rights adjudication process, the court itself engages with comparative law.[27] This section examines a gradual change observed in the mode of the South Korean Constitutional Court's engagement with foreign law and discusses its implications for comparative and human rights law critiques.

---

[25] *See* Mulder, *supra* note 1 (discussing the triangular relationship of the national courts and the CJEU and "their shared responsibility regarding the application and interpretation of EU law" and noting that national courts of EU member states "thus retain a substantial responsibility for ensuring that EU law is properly enforced, and they become 'decentralized EU courts' with primary responsibility for the 'effect utile of EU law'") (footnote omitted).

[26] *See supra* note 3.

[27] For general and comparative discussion on this matter, see generally THE MIGRATION OF CONSTITUTIONAL IDEAS, *supra* note 6; Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L.1103 (2000); Gábor Halmai, *The Use of Foreign Law in Constitutional Interpretation*, *in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1328 (Michel Rosenfeld & András Sajó eds., 2012).

In the Court's earlier years (since late 1988), the Court relied predominantly on German practice. It regarded Germany as the most persuasive reference point for a wide range of issues: the initial design of the constitutional court system; the basic structure of constitutional rights review centered on the proportionality principle; detailed theories of reasoning and sentencing; individual cases decided by the German Constitutional Court; even technical rules employed to operate the system. In the course of modernizing domestic law, Korea joined the family of Continental/Civil law. Under the influence of the colonial history, modern Korean law drew heavily on Japanese law, which had earlier absorbed much of German law. The First Constitution of Korea, promulgated in 1948, took the Weimar Constitution as its primary model. Most of the first-generation leading constitutional law scholars in Korea studied in Germany for their doctoral degrees and played influential roles in founding the constitutional court system and relevant theories in these early years. Similarities in Civil law systems also made the German law cases more accessible and comprehensible. Apart from this historical background, to many judges and scholars in Korea as in many other countries, the German constitutional court system and its theories of constitutional review have generally been considered an advanced role model. The systematic feature of the German constitutional review and its organized structure of reasoning also made the German model easier to comprehend and assimilate. The early years of the Court's foreign law engagement can be characterized as "predominant dependence on Germany." Other than Germany, U.S. law and cases have been consulted and cited regularly with an assumption of their being relatively advanced in general, and especially when a particular legal doctrine has originated from U.S. case law. Japanese law has been frequently cited as well, but this was mainly because a number of Korean domestic laws were drafted after Japanese law, and reference was made mostly for statutory interpretation, not constitutional interpretation.

As its own decisions accumulated, the Court became less dependent on the aforementioned states, and became openly interested in understanding worldwide

trends as well as specific practices in numerous countries beyond those selected few. It is now an established and routinized practice for the Court to conduct comparative research involving a broad range of states and regions. Extensive, in-depth research on foreign rights practices is conducted by an army of nearly seventy young research judges. The majority of these research judges are appointed in their 20s or 30s, fluent in one or two foreign languages, and work full-time at the Court in a permanent capacity. Recently, the Court has begun to hire researchers other than judges who have expertise in less-researched jurisdictions. The main duty of these research judges is to document a substantive research report for each pending case. Research on relevant foreign and international law comprises an integral part of their reports. The Court justices consult these reports and take them seriously into account during their deliberation and adjudication processes. Most justices, usually in their 50s or early 60s, have been educated in Korea for their entire lives and have served in ordinary courts or in the prosecutor's office for decades before being appointed to the Constitutional Court. As ordinary court judges and prosecutors, and as law students before that, most of them had little exposure to transnational dimensions of law and little occasion to doubt a nationalist approach to the constitution. These justices often experience self-transformation while serving at the constitutional court, and their collaboration with young judges and researchers plays a critical role. Justices gradually gain transnational insights reflected in their judgments. In recent decisions, the Court often designates a separate section titled "law of other states" in its decisions and discusses specific foreign law and a global trend on relevant topics. While the U.S. Supreme Court cases such as *Roper*[28] and *Lawrence*[29] have been treated as pioneering and have brought about heated debates on citing foreign law for constitutional review, and South Africa's *Death Penalty* case[30] has

[28] *Roper v. Simmons*, 543 U.S. 551 (2005).

[29] *Lawrence v. Texas*, 539 U.S. 558 (2003).

[30] S v Makwanyane and Another, CCT 3/94 (1995).

been widely praised as a paradigmatic example of trans-judicial dialogues,[31] such practice is a daily routine for the South Korean Constitutional Court.

Reference to foreign law by the Court is conducted in a serious manner. The research judges' reports not only discuss relevant constitutional law cases of other states, but also provide detailed introductions to the relevant foreign legal systems, supplemented by academic literature. The research judges interviewed by the author for this study agreed that their comparative research has a genuinely answer-seeking purpose and has real effects on the Court's deliberation and decisionmaking process. This effective role of foreign rights practices stands in contrast to ex post facto justification, result-driven decoration, or "cherry picking"—a criticism typically leveled against referring to foreign law in judicial review.[32]

Since comparative research is conducted in a routine and systemized manner, cases citing foreign law are common. A few examples are introduced here by way of illustration. In January 2014, the Court found the Public Official Election Law unconstitutional for disenfranchising prison inmates and those whose prison sentences have been suspended. In its opinion, under the subsection titled "law of other states," the Court provided a detailed survey of relevant legislation in Australia, Canada, Germany, Israel, Italy, Japan, South Africa, Sweden, and the United States.[33] It also introduced decisions by the U.S. Supreme Court, the Supreme Court of Canada, the Constitutional Court of South Africa, the High Court of Australia, the Constitutional Council of France, and the European Court of Human Rights.[34] This comparative discussion served as one of the important

---

[31] *E.g.*, Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 195 (2003).

[32] *See e.g.*, Jeremy Waldron, "PARTLY LAWS COMMON TO ALL MANKIND": FOREIGN LAW IN AMERICAN COURTS 171–86 (2012).

[33] Constitutional Court of Korea, 2012 Hun-Ma 409 (Jan. 28, 2014).

[34] The research judge's report for this case introduced relevant practices in forty-two European countries (discussed in the ECtHR Scoppola v. Italy case), along with a chart categorizing various countries' practices, followed by detailed explanation of each category with relevant foreign court decisions, comments and recommendations by the UN Human Rights Committee, and the guidelines by the Venice Commission submitted to the Council of Europe on the subject.

grounds for the Court to find the domestic election law unconstitutional. In the *Adultery* case delivered in 2015,[35] the Court began its reasoning, observing that "it is a global trend to decriminalize adultery," and cited the earlier practices of abolishing adultery crimes in Argentina, Austria, Denmark, France, Germany, Japan, Spain, Sweden, and Switzerland. After conducting a proportionality review that followed, the Court invalidated the criminal law that punished a person who committed adultery with imprisonment, for violating the right to privacy and sexual self-determination. In the 2010 *Death Penalty* case,[36] the Court mentioned that as of 2008, 105 states still had the death penalty system, while 36 of them had not executed anyone in the last 30 years and 92 states have abolished capital punishment. The absence of a dominant global trend provided one of the grounds for the Court to decide that sustaining a death penalty system does not go against with the right to life under the constitution.[37] In 2014, the Court held that the law mandating military service only for male citizens was constitutional, pointing out that among more than 70 states that adopt a conscription system, few countries impose this duty on women. Recently, countries in Latin America and Asia have begun to appear more frequently in decisions.[38]

### 2. Transnational Activities Beyond the Courtroom

The globalizing vision of the South Korean Constitutional Court is apparent also in its vibrant transnational activities outside the courtroom. The Court has made clear its ambitions to solidify a leadership position in Asia and to become a significant constituent of the global community of human rights and constitutional jurisprudence. South Korea is one of very few Asian states holding a

---

[35] Constitutional Court of Korea, 2011 Hung-Ga 31 (Feb. 26, 2015).

[36] Constitutional Court of Korea, 2008 Hun-Ga 23 (Feb. 25, 2010).

[37] Constitutional Court of Korea, 2011 Hun-Ma 825 (Feb. 27, 2014).

[38] For example, in the *Crime of Contempt* case, the dissenting opinion cited the relevant practices of Chile, Costa Rica, Honduras, and Guatemala. Constitutional Court of Korea, 2012 Hun-Ba 37 (Jun. 27, 2013). The Court increasingly cites the practice of Taiwan, China and other Asian countries in addition to Japan.

regular membership seat on the Venice Commission. In 2014, Korea hosted the 3rd Congress of the World Conference on Constitutional Justice, attended by the heads of constitutional courts, supreme courts, and equivalent organizations from almost 100 countries, under the theme of "Constitutional Justice and Social Integration." In 2018, Korea will host a World Congress of the International Association of Constitutional Law.

The former President of the Court, Park Han-Chul, who served in the position until January 2017, has expressed his enthusiasm for creating "the Asian Court of Human Rights" and hosting it in South Korea. As a preliminary step under his leadership, the South Korean Constitutional Court has led an effort to establish a network among Asian constitutional courts and their judges. In 2012, the Court hosted the Inaugural Congress of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC), with the theme of "Present and Future of Constitutional Justice in Asia." The AACC is current joined by constitutional adjudication bodies from sixteen countries in Asia, including Afghanistan, Azerbaijan, Indonesia, Kazakhstan, Kyrgyzstan, Malaysia, Mongolia, Myanmar, Pakistan, the Philippines, Russia, South Korea, Tajikistan, Thailand, Turkey, and Uzbekistan. In 2016, the AACC board of members agreed that South Korea will host the permanent Research Secretariat of the Association.[39]

The Court has been very active in hosting various international symposiums on constitutional jurisprudence and in inviting constitutional judges and scholars from abroad as short or mid-term visitors. It also regularly sends its research judges to parallel institutions or universities around the world to conduct research for extended periods. The Court's English website provides a detailed introduction to the Court system and practice, updated news on its various transnational activities, and a searchable database of its important decisions and publications, fully translated into English.[40] Taking a further step in this direction,

---

[39] http://english.ccourt.go.kr/cckhome/eng/introduction/news/newsDetail.do.

[40] The Court's English database: http://english.ccourt.go.kr/cckhome/eng/decisions/casesearch/caseSearch.do

the Court launched the Constitutional Research Institute in 2011, a branch research institute undertaking extensive studies of various subjects from longer-term academic and comparative perspectives.[41]

### 3. Self-Emancipation Through Transnational Engagement

Comparativist critiques have a point worthy of attention when they criticize a self-centered manner of comparative law studies, which tend to interpret others' realities with a bias rooted in comparatists' own local context and culture,[42] and often from a prejudiced "Western" view.[43] "Distancing and differencing" are suggested as an alternative methodology to overcome this limitation.[44] However, a question is raised whether it is possible to fully comprehend others' local contexts "in their own right," and if one does not or could not, then whether one fails to be a 'good comparativist.'[45] When local rights actors look at foreign practices to learn something meaningful, this process transforms self-understanding of the actors themselves as they continuously and openly engage with others and reflect on their own practice. Local comparatist actors' own context and their evolving self-identity also need to be taken seriously and without a bias.[46] The above self-

---

41 English website of the Institute: http://ri.ccourt.go.kr/eng/ccourt/main/index.jsp.

42 E.g., Simone Glanert & Pierre Legrand, *Law, Comparatism, and Epistemic Governance: There Is Critique And Critique* (forthcoming, 2017) (noting "comparative research, no matter how intrinsically excellent, is always already a failure. … foreign law cannot meaningfully be formulated on its own terms but must be the result of an enunciation by the self in the self's culture; foreign law … cannot generate a fixed or fixable meaning that would be independent from its interpreter's cultural background…" and "that comparative law is epistemically doomed since the comparatist must fail to access or recount foreign law on its own terms"). *See also* Pierre Legrand, *How to Compare Now*, 16(2) LEGAL STUD. 232; FRANKENBERG, *supra* note 1, at 42 ("comparatists stay comfortably settled in their armchair, look out of the window with its ethnocentric frame and make the – necessarily distorted – foreign familiar, thereby domesticating tis foreignness and levelling diversity").

43 FRANKENBERG, *supra* note 1, at 85–104.

44 *Id*. at 70–76.

45 *Id*. at 42 (discussing "*distancing* and *differencing* … essential for a genuinely 'good comparative practice' – 'good' insofar as they are guided by self-criticism, inspired by curiosity about the foreign (law) and based on genuine interest in understanding unfamiliar/foreign/strange legal norms and practices, institutions and cultures in their own right").

critique by comparativists seems to reflect too much on a "Western" conscience to detach oneself from its imperialist past. Moreover, this line of critique seems to assume that only "Westerners" are conducting comparative work. More attention needs to be paid to how local actors in various non-Western parts of the world engage with comparative law.

The comparativist critique that presumes a fixed and closed form of self-identity of a comparatist—mostly a "Western" self that consciously or unconsciously assumes oneself as a center or superior to others—does not apply to the experience of the South Korean Constitutional Court. The above survey of the Court's engagement with foreign law over its last 27 years of practice and its recent transnational activities show how the self-identity of this local rights actor has evolved overtime—from local into cosmopolitan one. Unlike in the United States, engaging with foreign law is not widely seen as a threat to democratic sovereignty in South Korea,[47] but is in fact conducted as a way of expressing and enhancing the *transnationalizing self* of national actors. For the South Korean Constitutional Court, referring to foreign rights practice has gradually evolved from a way of "catching up" with a handful of role-model countries, to extensive comparative research with a genuine answer-seeking function, as part of an effort to make more sound and persuasive judgments not only for the parties in the case, but also to a global audience. The Court's transnational aspirations go further: to play a "standard setting" role in Asia, and to promote human rights across borders. The development that has emerged over time in South Korea exemplifies a story of birth and growth of a local rights actor attaining a cosmopolitan self-

---

[46] Glanert and Legrand end their essay with remarks somewhat contradictory to their earlier discussion, by suggesting a positive potential of contextualized interpretation: "Because sheer duplication of foreign law is of no interest, interpretive enrichment in fact requires a comparative text that tells foreign law otherwise than on the law's own terms. Only then can there be a conversation, a deliberation, or a negotiation of the kind that may allow for an amelioration of what understanding of the other (and of the self) is feasible and thus afford a more significant interpretive yield. Inadequacy is opportunity." Glanert & Legrand, *supra* note 42.

[47] *See e.g.* Norman Dorsen, *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L J. CONST. L. 519 (2005).

understanding as it becomes exposed to and engaged with the wider world of rights jurisprudence and practice.[48]

The former and current justices of the Court interviewed by the author for this research agreed that the fundamental reason for referring to foreign rights practices is rooted in the universality of human rights and the common concerns retained by states about legitimate restrictions of rights, and that this engagement is made possible through a mutually comprehensible language of rights reasoning across jurisdictions.[49] The Korean judges' mindset supports the argument that regular reference to foreign rights practices does not necessarily pose a threat to the autonomy of a domestic constitution or a rights adjudication body, but can be an expression of and an effort to become a larger self. The South Korean Constitutional Court has transformed itself from its status as a follower and importer during the early stages of its jurisprudence, dependent on a few reference countries to fill the vacuum, to a regional leader and an autonomous and influential participant in global rights dialogues. This development has been achieved through active and continuous transnational engagement.

Limitations also exist at the current stage of comparative law engagement around the globe as part of rights practice. Concerns are sound in terms of geographical imbalance. There are abundant cases in which Western democracies cite each other's rights practice.[50] Asian Courts frequently cite European and Anglo-American cases, but things rarely work the other way around. Asian courts cite

---

[48] *See* Slaughter, *supra* note 31, at 192 (discussing an emerging global community of courts based on "the self-awareness of the national and international judges who play as a part"). *See also* Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129 (2005).

[49] These remarks by the judges confirm scholars' account of factors and reasons for consulting rights jurisprudence in other jurisdictions. *See e.g.*, Christopher McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD J. LEGAL STUD. 499, 527–29 (2000) (discussing possible reasons why human rights cases entail greater use of foreign law than in other areas). *See generally* Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99 (1994).

[50] *See* Cheryl Saunders, *The Use and Misuse of Comparative Constitutional Law* 13 IND. J. GLOBAL LEGAL STUD. 37 (2006) (discussing the practice among common law jurisdiction); Halmai, *supra* note 27, at 1331–34 (discussing earlier U.S. practice); McCrudden, *supra* note 49, at 517–23 (discussing relevant factors such as the type of political regime in which the foreign court is situated; pedagogical impulse; perceived audience; and the existence of common alliances).

Western cases much more frequently than they refer to the practices of other Asian countries. However, a sign of change is also emerging in communication flows. As mentioned, the South Korean Constitutional Court has begun to cite the practice of Latin American and Asian states. The Taiwan Constitutional Court occasionally cites Korean examples. The South Korean Constitutional Court increasingly receives requests from other states and international bodies for an English translation or background information about the Court's recent decisions. The Court's vigorous transnational activities in recent years and its intensifying efforts in comparative study and global communication have raised the expectation that greater mutual and substantive rights dialogues will emerge between the West and Asia and among Asian jurisdictions for the coming years. Through continuous efforts for transnational comparative engagement, a local rights court in South Korea has overcome its colonial past dominated by a few influential states, has grown into a regional leader, and is gradually increasing its global role in cosmopolitan rights practice. This bottom-up, "self-emancipation" story of a local rights actor provides a counterexample to a generalized criticism that human rights and comparative law possess Western imperialist continuities.

### Local Traditions Engaged with Universal Rights Norms

Critiques on human rights and comparative law criticize that an obsession with the universal norm or the "Common Core" erases the diversity and specificity of the local contexts.[51] It is at the same time doubtful however, that an assertion of "Asian values" could serve as a justification for denying universal human rights to any extent.[52] The ways that tradition or national culture comes into rights practice are more subtle and varied. This section examines the cases in which domestic laws rooted in traditional values in a society have been challenged by citizens as oppressive of their human rights, while on the other hand, tradition

---

[51] *See supra* note 1.

[52] *See generally* DANIEL A. BELL, EAST MEETS WEST: HUMAN RIGHTS AND DEMOCRACY IN EAST ASIA (2000); AMARTYA SEN, HUMAN RIGHTS AND ASIAN VALUES (1997).

was also asserted by other groups as a justification for restricting rights. The following cases illustrate how the conflict between traditional values (under the influence of the Confucian history in East Asia) and human rights and principles as embodied in the constitution—adopted with the nation's independence and modernization since 1945—have been exposed, deliberated and addressed through rights contestation and review processes. This case study exemplifies ways how contexts matter in the course of local rights actors' engagement with universal norms and how a contextualized cosmopolitanism emerges from this engagement.

### 1. Cases

If one has to pick the single most transformative decision made by the South Korean Constitutional Court so far, a likely candidate would be *Household Head System* (*hojuje*) decided in 2005.[53] The household head system had constituted a foundation of Korean family law since its birth, representing and reproducing traditional social and family structures based on a brand of male supremacy rooted in the Confucian tradition. Under this system, every Korean citizen was registered as a member of a "household," a basic unit of the society, which was comprised of a "house head," the eldest male in a family, and his subordinated family members, including his mother, wife and children. This law made a female citizen belong to her father when she was born, to her husband when she got married, and then to her son when her husband died, while a male citizen was free to create his own household and serve as a head when married. This institutionalized patriarchal family system was unique among modern democracies. Along with legislative movements to abolish *hojuje*, a nationwide coalition of women's rights and civil rights groups brought a constitutional claim to the Constitutional Court challenging this system.

---

[53] Constitutional Court of Korea, 2001 Hun-Ga 9 (Feb. 3, 2005).

After a series of open hearings and deliberation, the Court found the family law unconstitutional in violation of "individuals' dignity and gender equality in family" under Article 36 paragraph 1 of the Constitution. The majority opinion took up the matter of the relationship between tradition and constitutional principles. The reasoning started with holding that "if the Constitution sustains a neutral position toward a family life and system, it might be desirable to respect a traditional family system unless it goes against other constitutional provisions. However, if the Constitution adopts certain values and principles with respect to a family life and system, especially in the period of political and social transformation [meaning the time when the First Constitution was adopted in 1948], then those constitutional values and principles should be the supreme norm," and "the role of family law is not limited to reflecting social reality. . . . It should confirm and disseminate the constitutional principle." Then the Court discussed the relation between tradition and a democratic family system. It points to both Article 9 of the Constitution: "The State shall strive to sustain and develop the cultural heritage and to enhance national culture" and Article 36 paragraph 1: "Marriage and family life shall be entered into and sustained on the basis of individual dignity and equality of the sexes, and the State shall do everything in its power to achieve that goal," and emphasized the importance of making a harmonized interpretation of these two constitutional principles. The Court found that Article 36 paragraph 1 indicates a constitutional resolution to no longer acknowledge a longstanding patriarchal family order in the society. The Court articulated that the tradition mentioned in Article 9 is a concept with both historical and contemporary aspects, embracing the past as well as the present, and thus should be valid and reasonable under today's standards. If a traditional order goes against constitutional values and principles, including individual dignity and gender equality, that tradition cannot be constitutionally justified by invoking Article 9. The Court then proceeded in its reasoning to find that the household head system is unconstitutional violating gender equality and individual dignity.

In contrast, the dissenting opinion joined by two justices emphasized a constitutional duty to sustain and promote traditional culture, including the family system, which reflects "our unique and rational patrilineal tradition." Reviewing the household head system with the proportionality test, the dissenting opinion argued that preserving a patrilineal family order can serve as a legitimate government purpose, in light of the state's duty to uphold traditions under Article 9. The justices then found that the household head system met the necessity and the narrow balancing requirements, with an opinion that the wife-belongs-to-husband family practice has been taken for granted for a long time in a patrilineal society and that this reality has not changed much until today, and that this family system does not bring about substantively discriminatory effects against women. After this court decision, an entirely new, digitalized and individualized citizen registration system was developed and began to operate in South Korea. Every Korean citizen is now registered as an individual, neither as a household head nor a member subject to a head.

Another transformative case decided prior to the above case lies in the same vein. Korean family law has long prohibited marriage between citizens who have the same family name and origin. This law was based on the tradition of an agriculture society with an extended family system, combined with the Confucian and patriarchal social order. Under this law, about four million people whose family name is Kim with the same regional origin, but without any close family ties, were not allowed to marry each other. In 1997, the Court found this law unconstitutional in violation of human dignity and the right to pursue happiness as well as the gender equality principle under the Constitution.[54] The Court emphasized that the tradition and social order themselves change over time, and the basis for this law had already lost its legitimacy as a tradition protected under the boundary of Article 9. The Court also noted that this type of prohibition had been abolished in China, where this tradition originated, as early as 1930s. The Court did not go further with the proportionality test, finding that preserving an

[54] Constitutional Court of Korea, 95 Hun-Ga 6 (Jul. 16, 1997).

outdated social order cannot be a legitimate government purpose to restrict constitutional rights. On the other hand, two dissenting justices took the position that citizens' constitutional rights and equality are protected within the boundary of the tradition. They regarded that preserving the social order by enforcing a traditional marriage custom was a legitimate state reason to restrict rights and equality, and that the extent of rights restriction under this law was not excessive. The Confusion tradition and ethics appear in the criminal (procedural) law as well. The Korean Criminal Procedure Law prohibits a person from suing one's parents/grandparents or parents/grandparents in law for criminal charges.[55] This law is rooted in the traditional Confusion ethics of 'hyo,' a filial duty to one's parents. Five justices found this law unconstitutional, but the Court could not reach six votes, a required number to invalidate any law or government actions in Korea.[56] Reviewing the provision under the proportionality principle, the five justices viewed that depriving a crime victim of the right to sue an offender, for the purpose of preserving a family order based on the Confusion tradition (the purpose of which the judges regarded as legitimate), violates the right to equality of those whose lineal ascendants are criminal offenders. The other four justices regarded this law as constitutional, with the following rationale: that a crime victim's right to sue is not a constitutional right but a mere legal right under criminal procedure law; that the legislature thus holds broad discretion to regulate this right while taking into account the nation's own judicial culture, ethics and tradition; that Confucian traditions and ethics remain still valid today, especially regarding the relationship between direct ascendants and descendants, for which traditional culture and ethics should play more decisive roles than legal regulation; and that among those ethics, respect for one's parents has been considered as the supreme moral value, and the law embodying this value has a rational basis for discrimination.

---

[55] Crimes of sexual and domestic violence are exempted from this prohibition under Korean law.

[56] Constitutional Court of Korea, 2008 Hun-Ba 56 (Feb. 24, 2011).

## 2. Implications

The cases discussed above illustrate how traditions encounter universal human rights norms embodied in constitutional rights and principles. The rights review process serves as a venue to expose, deliberate and resolve conflicts and tensions between individual rights and traditional values or orders of society embedded in the law. Their dynamics are more complex than a dichotomous confrontation between universal human rights and cultural relativism.[57] Traditions are contested through a self-reflective, justificatory rights reasoning process.[58] Restrictive laws rooted in traditions need stronger justificatory grounds than the assertion that the law serves traditional values or conventional social order.[59] A rights contestation process deconsecrates long-standing traditions in society and requires justification in terms rights, equality and other constitutional principles.[60]

In the context of the South Korean constitution, the dynamics between rights and traditions wear more layers, as the Constitution provides for succeeding and developing traditions as a constitutional duty of the state (Article 9). The Constitutional Court in the first two cases addressed this tension by interpreting traditions in the contemporary context—excluding oppressive and outdated customs from the definition of tradition to be upheld under Article 9. Finding that preserving a patriarchal social order cannot serve as a legitimate purpose to restrict rights and equality, the Court did not have to proceed any further with the proportionality test.[61] On the other hand, the dissenting justices regarded that

---

[57] For general discussion on the subject, see e.g., DONNELLY, *supra* note 1. See also JAMES TULLY, STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY (1995), for discussion of accommodating cultural diversity into modern constitutionalism.

[58] *See* Mattias Kumm, *Comment: Contesting the Management of Difference—Transnational Human Rights, Religion and the European Court of Human Rights' Lautsi Decision*, *in* DIFFERENCE AND DEMOCRACY: EXPLORING POTENTIALS IN EUROPE AND BEYOND 245 (Kolja Raube & Anika Sattler eds., 2011).

[59] *Id.* at 252–54.

[60] *Id.*

[61] *See* Mattias Kumm, *Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement*, *in* LAW, RIGHTS AND DISCOURSE: THE LEGAL PHILOSOPHY OF ROBERT ALEXY 142–48

sustaining a traditional family order can serve as a legitimate purpose for restricting rights, backing up their position with the Article 9 duty. However, their proportionality reviews lack detailed and thorough reasoning. In the last case, five out of nine justices also tried to address the tension through proportionality reasoning. While these justices deemed upholding a filial duty to one's parents as a legitimate purpose of law, they found the law unconstitutional because it excessively restricted rights. The other four justices refused to review the law under the proportionality test, emphasizing the legislature's discretion to regulate this issue.

These cases exemplify the ways that tension and conflict between universal rights norms and local traditions are deliberated and reasoned through a nation's internal rights contestation and adjudication process. The majority opinions in each case make clear that a tradition or custom that does not uphold today's values and principles cannot provide justifications for restricting rights and equality. Even if some traditional values have continuing merits for contemporary society (such as 'hyo' in the last case), the law based on those traditions needs to be justified through a further balancing test. Unlike the comparativists' critique that universalist norms and "normalization" of reality into the language of rights flatten and erase specificity and diversity of the local context,[62] the actual rights practice in this local jurisdiction points to the opposite direction: the local context's specificity and complexities are brought to light, examined and deliberated through a rights reasoning process conducted in a thorough, transparent, and self-reflective manner. Contexts are not erased but revived through this rights practice. As specificity and complexities of reality are reasoned through a rights review process, the practice attains a contextualized cosmopolitan character with a capacity to accommodate both the locality of contexts and the universality of rights. These practices also demonstrate the

---

(George Pavlakos ed., 2007). Regarding a general structure of the proportionality test, see generally, ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS (2009); MATTHIAS KLATT & MORITZ MEISTER, THE CONSTITUTIONAL STRUCTURE OF PROPORTIONALITY (2012).

[62] *See supra* note 1.

emancipatory potential of the rights contestation and adjudication process for the individuals whose rights and equality have been denied under the name of tradition and national culture. Without such a rights review process, tradition could have more readily served as a uncontested justificatory tool by a dominant group to sustain oppressive law and social order. The cases examined in this section provides further examples of self-emancipatory and empowering stories achieved through rights actors' serious engagement with its own local context in light of universal norms, which are themselves concretized and contextualized in the process.

**Individual Empowerment: Bottom-up and Contextualized Cosmopolitan Rights Practice**

This section revisits the South Korean rights practices discussed thus far, reflecting on popular criticisms against human rights law as a static, top-down, elitist, and Anglo-Eurocentric enterprise that tends to alienate ordinary individuals.[63]

The previous sections examined the emerging human rights practice in South Korea with contextualized cosmopolitan features, focusing on role of the Constitutional Court as one of its key actors. However, the primary beneficiaries of cosmopolitan rights practice are not the courts or states, but every rights-bearing *individual*. As discussed in the last section, cosmopolitan rights practice can have an emancipatory effect for individuals, and this potential entails multiple dimensions of empowerment. Individual citizens and non-citizens are empowered by the adoption of the list of human rights in their constitution and an effectively functioning mechanism to contest these rights, challenging unreasonable or

---

[63] *See supra* note 3. *See also* McCrudden, *supra* note 49, at 531–32 (pointing out that "[i]n the judicial interpretation and application of human rights principles, the voices of the historically disadvantaged and marginalized are the voices least often heard, nationally and internationally. … ignoring the problem of participation whilst at the same time appearing to engage in a closed dialogue with other judges at the supranational level, may weaken the protection of human rights rather than reinforcing it.").

oppressive laws and government actions.[64] International human rights norms and other jurisdictions' rights practices further empower these individuals by providing them with additional grounds for requiring justifications for state actions that deviate from global norms or practice. This transnational rights practice mobilizes the individual to grow into cosmopolitan rights-bearers acting locally with global minds. Thus, through the rights review system with transnational features, individuals are empowered not only as *beneficiaries* of cosmopolitan rights practice, but also as its crucial *actors*. Recall the claimants in the cases discussed so far: women subordinated to men under the household head system; "comfort women" ignored by both Japanese and Korean governments; migrant workers abused by the discriminatory foreign labor system; disenfranchised prisoners and convicts; and conscientious objectors incarcerated, among numerous others who have been oppressed, discriminated, and marginalized by laws about which they had very little say. Through the rights review system, these individuals are empowered to bring a case, require justifications, engage in rights debates, and often bring about transformative outcomes toward a more free, equal and just society. Through this empowerment process, these individuals grow into central actors who drive and develop *bottom–up and contextualized cosmopolitan rights practice*.[65] Cosmopolitanizing rights practice led by empowered ordinary citizens and non-citizens in this local jurisdiction provides powerful grounds for challenging the criticism that human rights law is a static, elitist, top-down, and West-centric enterprise.

---

[64] *See* Mattias Kumm, *The Idea of Socratic Contestation and the Right to Justification: The Point of Rights–Based Proportionality Review*, 4 L. ETHICS HUM. RTS. 140, 168 (2010) (pointing out that the right to contest in constitutional review settings is at least as empowering as the right to vote). *See generally* RAINER FORST, THE RIGHT TO JUSTIFICATION (2012).

[65] *See* Wen-Chen Chang, *An Isolated Nation with Global–Minded Citizens: Bottom–Up Transnational Constitutionalism in Taiwan*, 4 NT'L TAIWAN U. L. REV. 203 (2009). More generally, LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY (Boaventura de Sousa Santos & César A. Rodríguez-Garavito eds., 2005). *See also* James Tully et al., *Editorial: Introducing Global Integral Constitutionalism*, 5 GLOBAL CONSTITUTIONALISM 1 (2016) (discussing the concept and the bottom-up practice of eco-social constitutionalism).

Individuals are not the only group empowered and mobilized by the cosmopolitanizing rights review system. The Korean example demonstrates how the court and the individual can mobilize and empower each other. In many cases, it is individual applicants who inform the Court of relevant international human rights norms and foreign practices. Increasingly, lawyers and NGOs supporting the applicants intensively research and invoke international and foreign human rights law as grounds for their constitutional claims. The rights practice by globally motivated private actors drives the Court to respond to their transnational rights claims when deliberating and writing its decisions. The Court justices regularly ask their research judges to conduct further research on relevant international norms and foreign practices in addition to the ones invoked by applicants. The Court also has its own transnational aspirations of playing a leadership role in Asia and beyond. The Court's global engagement further mobilizes individuals, lawyers and civil society to engage in transnational human rights practices more earnestly, which again informs the Court and advances its practice. Thus multiple aspects of bottom-up rights practices are developing in and through this rights review system: from individual rights-holders to the court; from young research judges to senior justices; from the local to the transnational. This phenomenon has been initiated and has developed not through top-down preaching by Western elite groups, but through local actors' transnational self-awareness and constant justice-seeking efforts.

## Conclusion

The rights practice in South Korea examined from multiple angles in this work exemplifies bottom-up and contextualized cosmopolitan human rights practice, which has grown locally outside of the West. This development has been advanced by local rights actors—the constitutional court with transnational aspirations, and the global-minded rights-claiming individuals. Their dynamic engagements with international and foreign human rights law facilitate more comprehensive and sound understanding and realization of human rights. Cosmopolitanizing

ideas of rights and self are also embedded in the practice of rethinking tradition and national culture in rights terms, taking seriously the locality as well as the universality of rights. The meaning and operation of universal rights norms are concretized and contextualized by local actors' constant transnational engagement. Existing tensions and struggles indicate the transformation and widening of the rights practice in progress. It is a living process that brings about self-emancipation and empowerment.

Nothing in my argument in this paper suggests that I take the concept of human rights or rights practices by and through rights review courts as a silver bullet to all problems either nationally or internationally. However, rights ground a wide range of emancipatory practices across the world, whether by individuals and civil society, or state and international institutions, which any serious critique of rights needs to engage with. The result of such engagement would be more grounded critiques of specific features of concrete rights practices, probably geared towards their improvement, rather than their abandonment in favor of something entirely different. Self-critiques raised by (Western) human rights and comparativist lawyers can be benefited from this contextualized story of self-empowerment achieved through cosmopolitan rights practice in a jurisdiction outside of their familiar realms.

Discussion Papers of the Research Area International Politics and Law 2015

Department: **Center for Global Constitutionalism**

**Yoon Jin Shin** SP IV 2017–801
Contextualized Cosmopolitanism: Human Rights Practice in South Korea

Discussion papers are downloadable:

https://www.wzb.eu/en/publications/discussion-papers/trans-sectoral-research